Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-167

IN THE

Supreme Court Of The United States

October Term, 1986

AMERICAN CAST IRON PIPE COMPANY,
Petitioner

vs.

ANNETTE COX, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Did the court below, in exercising appellate jurisdiction over the appeal filed by the 18 nonprevailing plaintiffs, when five motions to alter or amend the judgment were pending before the district court at the time their notice of appeal was filed, and the 18 nonprevailing plaintiffs did not file a second notice of appeal subsequent to the district court's ruling on these five post-trial motions, render a decision in total disregard of Rule 4 (a) (4) of the Federal Rules of Appellate Procedure, in direct conflict with applicable decisions of this Court, and in direct conflict with applicable decisions of every other federal court of appeals?

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ARGUMENT IN REPLY

Respondents, in their brief in opposition to the petition, have not provided this Court with any applicable facts or case law to support their position that the writ should be denied. In light of the inability of respondents to squarely face the substantial issue presented in the petition, the need for review is readily apparent; indeed, petitioner suggests that summary reversal is in order.

I. The Appeal By The Class Representative, Brenda Morgan, Does Not Alter The Conclusion That The Writ Should Be Granted.

Respondents are not being candid with the Court when they state that the class representative, Brenda Morgan, who pre-

vailed in the trial court, but who appealed for additional back pay, filed a notice of appeal on behalf of the class. Morgan simply appealed "from the Final Judgment entered April 30, 1984 and from the Order dated June 14, 1984, to the United States Court of Appeals for the Eleventh Circuit." (App. 60). In the court below, there was no indication in the respondents' briefs, or in the court's opinion, that Morgan appealed on behalf of the class. (App. 1-28). In fact, respondents' present argument was not even raised in the court below, even though the jurisdictional issue was fully briefed by the parties, and the Eleventh Circuit went to great lengths to distinguish Morgan's appeal from the appeal filed by the 18 nonprevailing plaintiffs. (App. 1-26). The court reversed the judgment entered against the 18 nonprevailing plaintiffs only after concluding, following an extended discussion, that: (1) it had jurisdiction to consider the separate appeal filed by the 18 nonprevailing plaintiffs; (2) the district court abused its discretion in decertifying the class; and (3) the district court applied incorrect principles of law to the claims asserted by the 18 nonprevailing plaintiffs. (*Id.*). This is simply not a case like *Deposit Guaranty Nat. Bank v. Roper,* 445 U.S. 326, 331 (1980), in which "the appeal was taken by the named plaintiffs, although its *only* purpose was to secure class certification," or *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 394 (1980), in which "[r]espondent, individually 'and on behalf of a class,' appealed." Respondents' belated assertion that the Morgan appeal provided jurisdiction for the court below to consider the claims of the 18 nonprevailing plaintiffs is based on mere "unadorned speculation" which "will not suffice to invoke the federal judicial power." *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 44 (1976).

Moreover, respondents have cited no authority, and we have found none, that allows individuals or putative class members who have tried their claims and lost, but who did not appeal from the adverse judgment entered against them, the opportunity to retry their claims a second time. None of the cases cited by respondents support such an absurd notion, and several of

the cases cited by respondents even support petitioner's position on this point. For example, in *Roper, supra,* this Court allowed the class representative to appeal, expressly recognizing that "[a]t no time has any putative class member sought to intervene either to litigate the merits or appeal the certification ruling." 445 U.S. at 331. Similarly, in *Gonzales v. Cassidy,* 474 F.2d 67, 76 (5th Cir. 1973), the court allowed the appeal because "members of the class" had not "been afforded due process of law by having a full day in court." *See generally United States Parole Comm'n v. Geraghty,* 445 U.S. at 404-05 n.11 ("Each case must be decided on its own facts"). In short, the 18 nonprevailing plaintiffs tried their claims in the district court, lost in the trial court, and did not file a valid appeal from the judgment entered against them. They have had their day in court, and are not entitled to a "second bite at the apple." *Burks v. United States,* 437 U.S. 1, 17 (1978).

II. The Entry Of The Rule 54(b) Judgment Does Not Alter The Conclusion That The Writ Should Be Granted.

Respondents have wholly failed to address the fact that it was only through the process of distorting and omitting what appeared on the face of the record before it that the court below could conceivably hold, and did so hold, that it had jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs. The court expressly stated that, notwithstanding the Rule 54(b) certificate, "[u]nder the plain language of Rule 4(a)(4), the 18 plaintiffs' June 7, 1984 notice of appeal would appear to have no effect." (App. 4). Nevertheless, the court concluded it had jurisdiction because Acipco's motion requesting that "attorney's fees and costs be assessed against the 18 losing plaintiffs" was "not a motion to alter or amend a judgment under Rule 59," and, therefore, the 18 nonprevailing plaintiffs were not required to file a new notice of appeal after the district court ruled on Acipco's motion. (App. 3-6). The record is clear, however, that Acipco's Rule 59 motion regard-

ing the 18 nonprevailing plaintiffs attacked the *finding* and *judgment* that they were "prevailing parties," *in the face of a judgment in Acipco's favor.* The motion was directed *not* to the collateral issue of the "taxing of costs" or the *amount* of attorney's fees to be awarded, as respondents assert, but rather whether the *judgment* awarding fees was proper. (App. 52-54). As this Court held in *Acosta v. Louisiana Dept. of Health and Human Resources,* __ U.S. __, 106 S.Ct. 2876, 2877 (1986), a civil rights action in which the Court affirmed the dismissal of an appeal under Rule 4(a)(4) when no new notice of appeal was filed after the disposition of post-trial motions, a motion contesting "an award of attorney's fees" is "a timely motion to alter or amend the judgment, as authorized by Federal Rule of Civil Procedure 59(e)." *See generally* 9 Moore's Federal Practice ¶204.12[1] at 4-67 & 4-69 (1985) ("Any motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label").

Moreover, an order is appealable under Rule 54(b) only if the claims designated in the order lack a substantial factual overlap with those remaining in the district court, and multiple consideration of the same or similar facts and issues would not be required.[1] The rationale underlying this principle is

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[1]*See, e.g., Minority Police Officers Ass'n v. City of South Bend,* 721 F.2d 197, 201 (7th Cir. 1983) (Rule 54(b) appeal dismissed for lack of jurisdiction because "claims are not separate for Rule 54(b) purposes if the facts they depend on are largely the same, or stated otherwise, if the only factual differences are minor. The burdens of multiple appeals are greatest in a case where the successive appeals bring up the same facts"); *Para-Chem Southern, Inc. v. M. Lowenstein Corp.,* 715 F.2d 128 (4th Cir. 1983) (Rule 54(b) appeal dismissed where the certified claims were sufficiently intertwined with those remaining in the district court to create the distinct possibility of repetitive appellate review of the same facts and issues); *Arlinghaus v. Ritenour,* 543 F.2d 461, 469 (2d Cir. 1976) (Rule 54(b) appeal dismissed for lack of jurisdiction where court of appeals would "be required to review the same conduct twice, in defiance of the federal policy against piecemeal appeals"); *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.,* 463 F.2d 101, 103 (2d Cir.), *cert. denied,* 409 U.S. 1040 (1972) (Rule 54(b) appeal dismissed where "Western's claims and Bolt's counterclaim are so closely related that piecemeal appeals are inappropriate").

that a particular court of appeals, often sitting in separate panels, should not be required "to reacquaint itself again and again with the basic facts of the case." *Minority Police Officers Ass'n v. City of South Bend,* 721 F.2d 197, 200 (7th Cir. 1983). *See generally Curtiss-Wright Corp. v. General Elec. Co.,* 446 U.S. 1, 8 (1980) (Rule 54(b) should be used sparingly "to assure that application of the Rule effectively preserves the historic federal policy against piecemeal appeals"). Of course, an improper Rule 54(b) certification does not vest jurisdiction in the court of appeals, even in the absence of prejudice to the nonappealing party. *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737 (1976).

In *Behring Int'l, Inc. v. Imperial Iranian Air Force,* 699 F.2d 657 (3d Cir.), *reh'g denied,* 712 F.2d 45 (3d Cir. 1983), the Third Circuit illustrated this principle, expressly rejecting the Rule 54(b) argument raised by respondents in this case:

> In summary, we hold that under Fed.R.App.P. 4(a)(4), a party may not appeal from a decision certified pursuant to Fed.R.Civ.P. 54(b) while the district court is considering a Fed.R.Civ.P. 59 motion filed by the opposing party if the appeal and the Rule 59 motion raise identical or *closely related legal issues in the same factual context.* To hold otherwise would allow an appeal under circumstances which would constitute simultaneous exercise of original and appellate jurisdiction over identical *or related subject matter* in violation of the explicit dictates of *Griggs.* We therefore conclude that the Iranian defendants' appeal was premature and of no effect under Fed.R.App.P. 4(a)(4) as interpreted by the Supreme Court in *Griggs.*

712 F.2d at 47-48 (emphasis added). Contrary to respondents' assertion, there is no indication whatsoever in the court's decision in *Behring* that because the Rule 59 motion was filed *after* the Rule 54(b) certification, the court of appeals lacked jurisdiction to act. The court in *Behring* made no such distinction; it simply applied the general principle discussed above that an order is not appealable under Rule 54(b) if the claims designated in the order have a substantial factual overlap with those remaining in the district court.

In this case, as in *Behring*, the Rule 59 motion filed by Acipco and the appeal filed by the 18 nonprevailing plaintiffs raised "closely related legal issues in the same factual context." The basis of Acipco's motion was that the 18 losing plaintiffs were not "prevailing parties" within the meaning of 42 U.S.C. § 2000e-5 (k) or Rule 54 (d), Fed.R.Civ.P., because they were unsuccessful on the merits of their claims at trial. Plaintiffs appealed on the ground that the trial court erred in finding that they were unsuccessful on the merits of their claims at trial. As in *Behring*, "had [the court of appeals] heard the [plaintiffs'] appeal while [defendant's] motion for reargument was pending before the district court, both courts might have simultaneously or very nearly simultaneously reached inconsistent conclusions. Such an occurrence would squander judicial energy and create confusion and uncertainty in the courts." *Behring*, 712 F.2d at 47. Hence, contrary to the respondents' assertion, there can be no question but that the Rule 59 motion and appeal raised "closely related legal issues in the same factual context." *Id.* As *Behring* clearly demonstrates, when a notice of appeal is filed while such a motion to alter or amend the judgment is pending in the district court, and a second notice of appeal is not filed subsequent to disposition of the post-trial motion, the court of appeals lacks jurisdiction to act. *Behring, supra;* note 1, *supra*. Of course, Rule 54 (b) would still have full play in post-trial proceedings, except in the situation here, as described in *Behring, supra*.[2]

In summary, respondents' attempt to shift the Court's focus in this case away from the straight-forward question presented for review demonstrates the inherent weakness of their arguments in opposition to the petition. The writ should be issued in this case because litigants, the federal district courts, and the

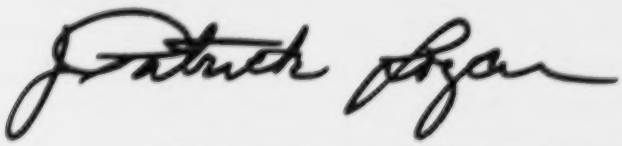
[2]In addition to the reasons stated in *Behring* and the other cases cited in this brief, "a secondary purpose of requiring a subsequent filing of a notice of appeal is that a notice of appeal filed before the disposition of a post-trial motion would not embrace objections to that disposition." *United States v. Valdosta-Lowndes County Hospital Authority*, 668 F.2d 1177, 1179 n.3 (11th Cir. 1982). *See generally* Rule 4 (a)(4), Fed.R.App.P., Committee Comments (same).

federal courts of appeal, in absence of a ruling on the issue, will have to waste valuable time and resources briefing, debating, and deciding the substantial jurisdictional question raised herein. It is of great importance to have "guides sufficiently clear to prevent the great waste that could [and does] result from protective appeals and litigation over appellate jurisdiction." 15 Wright & Miller, *Federal Practice and Procedure* § 3913, p. 523 (1976). The bright-line rule urged by petitioner in this case will not only prevent such needless waste, but will also preserve the virtue of clarity sought by Rule 4 (a) (4) and this Court's decisions in *Griggs* and *Acosta*, thereby ensuring sound, impartial, and uniform administration of justice in the courts of the United States. *See Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir. 1986) (*en banc*) ("A bright-line rule is essential to carry out the very purpose of the 1979 amendment to Rule 4 (a) (4) and to avoid wasteful confusion over the status of a previously filed notice of appeal").

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, summarily reverse the judgment of the court of appeals, and remand the case with directions to dismiss the appeal filed by the 18 nonprevailing plaintiffs.

Respectfully submitted,



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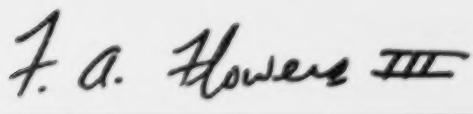

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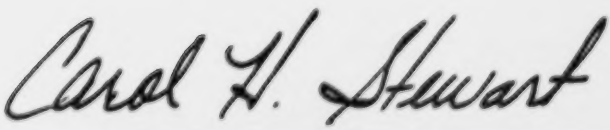

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PROOF OF SERVICE

I, F. A. Flowers, III, a member of the Bar of this Court, as counsel of record for petitioner herein, American Cast Iron Pipe Company, hereby certify that three copies of the above and foregoing Reply Brief have been served by United States mail, properly addressed and first-class postage prepaid, on this the 18th day of September, 1986, upon counsel for respondents, Robert L. Wiggins, Jr., Esq., Gordon, Silberman, Wiggins & Childs, 1500 Colonial Bank Building, Birmingham, Alabama 35203, and J. Scott Vowell, Esq., Beddow, Fullan & Vowell, 900 Massey Building, Birmingham, Alabama 35203.

It is also certified that all parties required to be served have been served.

F. A. Flowers, III

F. A. Flowers, III

Sworn to and subscribed
before me on this 18th day
of September, 1986.

Susan S. Turner

Notary Public